IN RE ARBITRATION BETWEEN:

AFSCME, COUNCIL 5

and

STATE OF MINNESOTA – ST. PETER REGIONAL TREATMENT CENTER

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 06-PA-325

JEFFREY W. JACOBS

ARBITRATOR

April 24, 2006

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 06-PA-325

State of Minnesota – St. Peter RTC,

APPEARANCES:

FOR THE UNION:
Bruce Iverson, AFSCME Business Agent
Scott Axtell, grievant
Scott Grefe, AFSCME Business Agent
John Knobbe, Union Steward
Peggy Kreber, President Local 404
Tammy Hughes, Union Steward
Jerry Kerber, Director of Licensing, DHS

FOR THE EMPLOYER:
Sandy Blaeser, Labor Relations Representative Principal
Larry TeBrake, Site Director of Forensic Services
Larry Nelson, Human Resources Manager St. Peter RTC
Valerie Darling, Labor Relations Representative, DOER

PRELIMINARY STATEMENT

The above matter came on for hearing on April 6, 2006 at 10:00 a.m. at the St. Peter Regional; Treatment Center in St. Peter, Minnesota. The parties presented testimony and documentary evidence at which time the record was considered closed. The parties waived post-hearing Briefs and submitted the matter on oral argument.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2001 through June 30, 2003. Article 17 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

ISSUES PRESENTED

The parties stipulated to the issue as follows: did the employer violate the contract by not accommodating the Grievant's DHS Licensing restriction for the duration of the request for reconsideration period? If so, what shall be the remedy?

PARTIES' POSITIONS

UNION'S POSITION:

The Union's position was that the State failed to make every reasonable effort as the operative contract language requires and that as a result of that the grievant has lost some $9,000.00 in wages and had to pay out of pocket medical expenses of approximately $9,000.00 as the result of losing his dependent health insurance coverage during the period he was out of work. In support of this position the Union made the following contentions:

1. That the grievant was accused of possible child abuse by his former wife during a custody battle over his children. The wife reported this to the authorities and the grievant was sent a letter from DHS dated May 23, 2005. The grievant was disqualified from working with vulnerable adults as that term is defined in M.S. ch. 626. The letter from DHS also advised the grievant that the facility could decide to either allow him to work or not. If it did the grievant was required to advise the facility that he was requesting a reconsideration of the disqualification under DHS rules and that the grievant must be within sight or hearing of a supervising person.

2. In addition to the letter DHS sent to the grievant it also sent a letter dated May 23, 2005 to the facility as well. This letter provided more detail about the terms of the disqualification. This letter advised the facility that it could continue to employ the grievant after documentation of the grievant's request for reconsideration of the DHS disqualification and some documentation of how the facility planned to allow the grievant to either work without direct patient contact or how the facility had arranged for the grievant to be within sight and hearing of a supervising person whenever the grievant was in a direct patient contact situation.

3. The grievant did in fact request a reconsideration of the DHS disqualification. See memo dated June 8, 2005. The disqualification was eventually set aside and allowed the grievant to return to work without the restriction. This however took several months.

4. The grievant was a permanent employee at the time of this disqualification and as such should not have been terminated. The State however sent the grievant a notice of termination, later determined to be in error, dated May 26, 2005. This was in clear violation of the contractual provision, cited below, at supplemental agreement Article 12. In fact the State later rescinded this but not until Step 3 of the grievance procedure, see e-mail dated September 7, 2005 in which the State offered to change the termination to a leave of absence. In fact the grievant himself has never been formally advised that this occurred.

5. The Union pointed to Article 12 of the supplemental agreement covering this facility that reads as follows: If you are a permanent employee who doesn't pass a background check or has practice restrictions placed on your license by an outside agency, the Appointing Authority will make every reasonable effort to accommodate the restriction. If the restriction cannot be accommodated, you will be placed on an unpaid leave of absence. The accommodation of the leave of absence will continue for the duration of the appeal process."

6. The Union argued that is clear and means that the State must essentially go out of its way to accommodate any restrictions placed on an employee by an outside agency. In fact, the Union asserted, the types of restrictions imposed by DHS are somewhat common and well known within this facility given the nature of the work.

7. Moreover, the Union argued that there is considerable bargaining history connected with this language. The State has on two occasions tried to insert language into the agreement whereby it could place a person on an unpaid leave without the need for accommodation. These efforts were rebuked by the Union and that language did not appear in the contract. In 1999 the State attempted to insert language that would have read simply, any employee who receives a disqualification letter from DHS licensing, may be placed on an Appointing Authority unpaid leave of absence during the appeal process. The Union said no to that proposal in 1999.

8. In 2001 the State tried again to introduce language that would have again given the facility the right to impose a leave of absence on an employee who had gotten a disqualification letter from DHS. Again the Union said no to that and instead the parties negotiated the language that appears in the contact which requires "every reasonable effort" to accommodate the restriction. The Union pointed to the State's interpretation of this language and argued that even the State's negotiators believed that the "every reasonable effort" language required that they would do their best to find such persons another job during the reconsideration process. See page 10 of 14 of State exhibit 3A.

9. The Union argued that given this history it is apparent that the parties desired that the State not simply dismiss the requests for accommodation and that it requires the State to cite more than mere inconvenience or administrative difficulty to meet the restrictions.

10. The Union pointed to an arbitration Award over the same language in a different article but again between the same parties defining the clause "every reasonable effort." That same term appeared in the 1975 contract in the vacation article as it still does today, requiring every reasonable effort to schedule vacations at a time agreeable to the employee.

11. In 1982 this language was the subject of an arbitration where Arbitrator Larkin McClellan fleshed out that term. He ruled in favor of the Union in that matter concluded that the State did not make every reasonable effort to schedule grievant's vacation in that case. He found that there were several things the State could have done to accommodate his request and that while it would be more convenient to simply not schedule vacations during winter months, the language required the State to make every reasonable effort to schedule the requests. The Union asserted that the award makes it clear what that term means in this contract: it means that the State must do more than simply dismiss the request and must make every, not just some, reasonable effort to accommodate the request. The State cannot simply say that it may be inconvenient or that it will be more expensive but rather must demonstrate that there is a very real and substantive reasons not to be able to accommodate the request.

12. The Union argued that the language appeared in the contract in response to an earlier grievance case involving these same two parties on virtually identical facts that was denied on procedural timeliness grounds. The parties negotiated this language so it would not happen again.

13. Here, the Union argued, the State failed to make every reasonable effort. There were several places they could have put the grievant either where there was no direct patient contact or where he would have been within sight or hearing of a supervising person.

14. The Union argued too that the burden of proof is on the State under the terms of this contract language to prove that it did make every reasonable effort. Here, the Union argued that the State failed to show that it did thus requiring the grievance be sustained.

15. The Union presented testimony from DHS's licensing supervisor who testified that the term "direct contact" has a clear statutory definition and that the grievant could have worked under the rules in effect at the time of his disqualification and not had direct patient contact. Further, the supervision requirement does not mean a supervisor; it means only that another person be within sight or hearing of the grievant whenever he is in a direct patient contact position. It doesn't even mean within sight or hearing at all times but rather only when in direct patient contact.

16. Finally, the Union claims that the State's decision to terminate the grievant, in error, jaded the whole proceeding and that even though the parties were discussing ways to accommodate the restriction, it was clear that the State felt that the grievant was terminated and did not even need to be accommodated under the terms of Article 12 until the Step 3 grievance procedure.

17. The essence of the Union's claim is that the State failed to make every reasonable effort at accommodating the grievant's licensing restrictions and simply assumed they did not have to since they believed he was a probationary employee and not subject to the terms of Article 12. Further they did not look at the Union's proposals seriously; they simply blew them off without further explanation. The Union implicitly asserted that this case is really about trying to slide out from the requirements of Article 12 that the parties negotiated just a short time ago.

The Union seeks an Award sustaining the grievance and ordering the State to pay the grievant's lost back wages and out of pocket medical expenses and to make him whole for any lost benefit under the contract.

EMPLOYER'S POSITION

The State took the position that the administrators at the facility made every reasonable effort to accommodate the restrictions but simply determined that there was no way they could accommodate the licensing restrictions placed on the grievant. In support of this position the Employer made the following contentions:

1. The State initially noted that it had made an error in terminating the grievant. He had been a part-time employee and they simply had not properly calculated his hours when they received the DHS letter to determine his permanent status. The terms of Article 12 only apply to permanent employees. Once the error was discovered, his record was corrected to rescind the termination and change that to an unpaid leave of absence.

2. The State further noted that during the pendency of the grievant's disqualification, they held multiple meetings and discussions with the Union regarding the grievant's licensure and how they could place him in another job during the reconsideration period but that they simply could not find one that worked.

3. The State argued that the St. Peter Regional Treatment Center, SPRTC, houses patients some of whom have committed serious and violent crimes. Many of them are mentally ill and suffer from a variety of conditions but all are considered vulnerable adults within the meaning of the term under Minnesota law. As such, the State faces considerable liability if there is any sort of abuse or neglect of vulnerable adults by staff.

4. Once the State received the letter from DHS advising it of the license disqualification, the administrators at the facility did meet with the Union to discuss the grievant's position. They took the Union's proposals seriously and looked at several ways to find him employment within the facility where he could be within sight or hearing of a supervising person. They simply could not do it.

5. The State agued that the North South control room, visited during the hearing, would not work. Even though the grievant would be essentially locked in away from patients, it is considered unadvisable to have him there all day. Staff typically rotates through that job during the day.

6. Moreover, the State argued that there is an intercom in the control room that could potentially allow the grievant to contact a patient in his or her room without anyone's else' knowledge. There is potential for abuse there.

7. Further, the State argued that the control rooms at the entry points would not have worked since those areas require 6 weeks of training for employees to work there. The State provided testimony that they did not know how long the grievant's reconsideration period would last and did not therefore want to invest the time and work into training the grievant for a position he may or may not have been able to work.

8. The State argued that the other positions proposed by the Union would not work since they too could involve patient contact around the facility and that it was impossible to ensure that he would be within sight or hearing of a supervising person at all times.

9. The State noted that the SPRTC has changed drastically over time from a treatment facility to a security facility. Recent events, such as the Drew Sjodin kidnapping and the recent escape of 2 patients made it very clear that security must be foremost in everyone's minds at this facility. The grievant simply posed too great a risk to even be on the grounds without supervision. The State asserted that it tried mightily to find a way to have the grievant supervised while on campus at all times but that they simply could not do it. Having someone take time to watch the grievant all the time is too costly and poses a risk of understaffing the facility, which of course poses its own security risk.

10. The State argued that the Union bears the burden of prove on this as a contract violation. It must thus show that the State failed to make every reasonable effort rather the other way around. The State argued that the Union failed to show by a preponderance of the evidence that it failed to make every reasonable effort and that the grievance must fail.

11. The State asserted that it complied with the terms of the Article and made every reasonable effort but that this term does not mean that it must always find the grievant or anyone in his situation another substitute job. It means only what it says – make every reasonable effort. The contract language continues to provide what occurs when an accommodation cannot in fact be made: it merely requires that the person so affected be placed on an unpaid leave of absence. That is precisely what occurred here. The State tried to find a job but could not and so placed the grievant on an unpaid leave. The fact that it did so later than it should have changes nothing.

12. Thus, the essence of the State's argument is that the terms of the contract do not require an accommodation but rather that the State make every reasonable effort to do so. If it cannot then the grievant is placed on unpaid leave. The State of course argued that the matter must be denied in its entirety but that if the arbitrator finds that the State did violate the contract then any back pay must be reduced by the UIC and any wages the grievant earned in the interim.

The Employer seeks an award denying the grievance in its entirety or in the alternative that any back pay award be reduced by the UIC and wages earned during the period in question.

MEMORANDUM AND DISCUSSION

Initially, it must be determined which party has the burden of proof in this matter. The State argued that this is no different from any other contract interpretation matter. The Union, as the moving party, bears the burden of proving by at least a preponderance of the evidence that the State failed to make every reasonable effort to accommodate the grievant's licensure restriction. The Union on the other hand argued that the terms of the clause make that an absurd result and that the State bears the burden of showing that if did make every reasonable effort to accommodate the restriction.

A review of the arbitral theorists in this area reveals that this is a much-debated issue. Elkouri notes that it may depend on the nature of the issue, the specific contract provision, as a usage established by the parties. Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. p. 422. See also Hill and Sinicropi, *Evidence in Arbitration*, BNA , 1980 at p 13-14. Several prominent arbitrators have frankly dismissed the notion that the burden of proof in arbitration is very important at all. There appear to be no consistently applied rules to this with the possible exception of discipline and discharge cases. Even then there is a difference of opinion as to the quantum of proof necessary to establish just cause. Professor St. Antoine has indicated that the burden is generally on the shoulders of the party that makes the claim: the party that asserts must prove. See, *Common Law of the Workplace*, St. Antoine, 2d Ed. BNA Books, 2005, at Sec. 1.92, p. 53. Here it is the Union that bears the burden of going forward and must therefore show that the employer violated the contract. There is nothing in the contract language that dictates a different result from the general rule that the moving party carries the burden of going forward and the burden of proving by at least a preponderance of the evidence that there was a contract violation.

Moreover, as a practical matter the burden of proof may not make all that much difference to the outcome of the case. The lynchpin of this case is not so much the burden of proof but rather whether the evidence shows whether every reasonable effort to accommodate the grievant's license restriction was made. Perhaps the best pronouncement on the burden of proof and its effects was from *An Effort to Describe One's Person Decisional Thinking*, 33rd Annual Meeting of the National Academy of Arbitrators, 1980. The arbitrator who drafted this noted as follows:

> I also have the perception that one has to be cautious about prematurely turning to 'burden of proof' ideas in the course of decisional thinking. It is susceptible to self-indulgent use to foreshorten the persistence of puzzlement, itself often enough an unpleasant and irksome experience, which sometimes is necessary to in order to break out of the underbrush of contention and loose ends of circumstance that clutter up and obscure the route of the tried to this reconstruction of events. As with legal conceptual reasoning in general, the relief supplied by invocation of the concept of burden of proof is experienced because further painful attention to the dilemma of irresolution has thereby been obviated; the need to be concerned about analysis has thereby been removed.

This arbitrator is not completely certain what that meant in this context but if that arbitrator's point was that most of the discussion about the importance of burden of proof in arbitration is pedantic, intellectual sounding gibberish his point was well taken.

The instant case turns on the phrase "every reasonable effort" found in the contract and what that means in this context. The Union pointed to the negotiation history of this phrase and argued that the State had initially wanted to be able to place persons whose licenses had been placed on suspension by DHS on an unpaid leave of absence. The evidence showed that the proposals made by the State during negotiations in prior years would have done just that. The evidence further showed that the Union rejected those proposals in favor of the language eventually proposed by the State that is currently found in the contract. This was also apparently placed there following a very similar arbitration in 2000 where the grievant had also lost his license due to an investigation by DHS for a period of time. There the grievance was found to have been untimely and was denied on that basis. The matter did not reach the merits. It should be noted too that the contract language in place for that grievance was not the same as the contractual language found at Article 12 here.

The Union argued based on this negotiation history that the phrase: "every reasonable effort" is clear and unambiguous and has a generally accepted meaning around the facility that the State must essentially find someone another job unless it is shown to be just impossible to do that. The State disputed this and argues that it meant nothing of the sort and that all it means is that the employer has to look at other potential jobs but has no obligation whatsoever to find someone a position. The State pointed to the second sentence of the article that specifically references what happens if a restriction cannot be accommodated.

The Union pointed to a prior arbitration interpreting that phrase in another part of the contract. The vacation article uses those same words in describing the efforts to find a vacation schedules that will work for people. Arbitrator Larkin McClellan found in a 1982 case that the employer had not used every reasonable effort to accommodate vacation schedules where the employer had essentially denied all vacation requests during the winter months in case of a snowstorm.

The Union argued that Arbitrator McClellan's award was based largely on the phrase "every reasonable effort" and that he determined that the employer needed to show more than mere inconvenience or some possible hazard or problem in order to demonstrate that it had in fact made every reasonable effort to accommodate the vacation schedule. There the employer had a policy against more than one pre-planned vacation during the winter months in case of a snowstorm. The vacation language however also provided that "no vacation requests shall be denied solely because of the season of the year but shall be dependent upon the staffing needs of the agency."

The Arbitrator went further however and examined what the employer could have done to accommodate the vacation requests made and ruled that due to these other things they could have done, the employer had not on those facts made every reasonable effort.

The case certainly provides some guidance as to the meaning of the phrase but did not go as far as the Union claimed. The case was decided largely on its own facts but does provide clear precedence that the mere inconvenience of the employer is not enough to show that the employer has made every reasonable effort. An examination of the moves the employer could have done is appropriate.

Taking the evidence as a whole, including the negotiation history of this article and the prior arbitrations it is clear that the language is by no means completely clear and unambiguous. This is in fact the first time this language has been challenged or arbitrated on its merits at this facility so it cannot be said that there is a generally accepted understanding as to its meaning. The McClellan arbitration dealt with another part of the contact and was in part based on very different language.

Cases involving this phrase must therefore be determined on their own unique facts to see if indeed every reasonable effort was made as determined by an arbitrator. Here that will depend on what options were open given this grievant's position, the staffing options open at the time, what restrictions were on the grievant's license and how those restrictions are interpreted by the agency imposing them and just what suggestions were made to accommodate his license restrictions by the Union. As time goes by and more flesh is added to the bones of this phrase there may well be a more generally accepted understanding of this phrase but for now the case must rise and fall on its own unique facts.

It is important to understand what the actual restriction was that DHS placed on the grievant. DHS sent the grievant a letter dated May 23, 2005 disqualifying him from working with vulnerable adults. The letter stated that he could request a reconsideration of this. The evidence clearly showed that he did make such a request. Moreover, the letter stated that the facility may allow him to continue working if he requested a reconsideration, informed the facility of that fact, and that he was within the sight or hearing of a supervising person.

DHS also sent a letter to the SPRTC dated May 23, 2005 advising the facility of the grievant's disqualification. This letter indicated that the facility could still employ the grievant and could allow direct contact with a vulnerable adult only after the facility has documented that the grievant requested a reconsideration and documentation as to how the facility has arranged for the grievant to be continuously within sight or hearing of a supervising person "whenever he/she is in a position allowing direct contact with persons receiving services from your facility."

Mr. Kerber provided very clear evidence about what this meant. First, the grievant would not be allowed direct contact with vulnerable adults without being in constant sight or hearing of a supervising person. A "supervising person" need not be a supervisor. It could be almost anyone as long as they were within sight and hearing of the grievant when he was engaged in direct contact.

Second, under the rules in effect at the time the grievant's disqualification was imposed, the sight and hearing requirement only existed when the grievant was engaged in direct contact with patients. The evidence here was that casual contact was not prohibited and that the grievant could have been on the grounds under the rules in effect when his disqualification was imposed without being in violation of the terms of that disqualification.

Third, and crucially important, the definition of "direct contact" found in DHS rules and Minnesota law at M.S. 245C.02 (11) is as follows: Direct contact means providing face-to-face, training supervision, counseling, consultation, or medication assistance to persons served by the program [vulnerable adults]. The evidence showed that merely being on the intercom with a patient did not violate these terms and does not meet the definition of direct contact. It was also clear from the evidence in this matter that the terms of the grievant's disqualification was only against such direct contact.

Several things mitigated against the employer's position here. First, it was not insignificant that initially the State fired the grievant and did not overturn that action until step 3 of the grievance procedure. It is clear that the employer acknowledged this error and has now altered the employment records to expunge the termination action and replace that with an unpaid leave of absence. However this action could well have tainted the employer's view of how much effort they really had to make in order to accommodate the license restriction. This was also a critical piece of evidence in this matter. The requirement that the employer make every reasonable effort to accommodate the restriction only applies to permanent employees. Here the grievant was a permanent employee but the employer did not acknowledge that until months later. See e-mail message date September 7, 2005.

Further, the messages exchanged between the parties indicate that the employer viewed this as a situation where the grievant had to be under constant sight or hearing of a supervising person. That was not so as shown above. This requirement only existed when he was engaged in direct contact with patients.

The Union further argued that it made several suggestions for how to place the grievant either in a job that would have no direct patient contact or where he would be supervised by another person within the definitions of those terms under DHS rules. These were apparently rejected by the State. State witnesses testified that they tried to find another job for the grievant but were unable to place him in a position where he would have no direct patient contact.

Here the evidence showed that there were indeed positions he could have had that would have placed him in positions of no direct patient contact. The control room the parties and the arbitrator visited was one such place. The grievant would have in fact been locked into this and would have been monitoring door and video cameras among other things. In order to leave he had to be let out by a central controller. The only contact possible with patients is through an intercom. This was the stated reason for not allowing him to fill that position during the restriction. As shown above however, having contact with an intercom was not on this record shown to come within the purview of direct contact as defined by DHS rules and Minnesota law.

Moreover, the other control areas by entrances and exists were also shown to be positions he could have taken and that would have met the restrictions imposed by DHS. The employer agued that it would have taken some 6 weeks to train the grievant for positions. The length of time necessary to train an employee for a position under the terms of Article 12 is not a relevant consideration. The language says every reasonable effort. While that is certainly open to some interpretation, it means more than just some reasonable effort or a reasonable effort. It says “every” and that under these circumstances means that every avenue must be explored and that those possibilities cannot be dismissed due to mere inconvenience. As will be discussed more herein, it is important though to recognize that this case is decided on the unique facts of this case. Future cases will simply have to await a determination on those unique facts as well.

The employer also stated in testimony that it could have placed him in several positions if they had known the restrictions would be short but that no one knew for certain how long the restrictions would last or how long the reconsideration period would be. That is exactly the point of the contract language however. Since no one does know how long that it will take, the employer must make every reasonable effort to find someone an appropriate position. The length or brevity of the reconsideration period is not a requirement under this contract language. It is clear too that the employer may well have decided not to accommodate the grievant since they did not know how long that would last even though they could have done so conveniently for a short period of time. Convenience is, to use the words of arbitrator McClellan, not a consideration under this language.

The employer stated its concern that there are several other cases pending and that this matter will set a precedent. The parties must understand that this case is decided on its own merits and that it possessed unique facts that may or may not distinguish it from future cases. For example, it was shown that some of the rules have changed and that disqualifications under DHS rules now may well be different than what were imposed on this grievant. No evidence was submitted on that specifically other than that simple statement (it was not clear on this record how those rules are different or what impact they would have on a person now in the grievant's position) so no decision is made regarding that. It is also clear that the term "reasonable" is subject to considerable interpretation and may well require the employer to undergo some additional cost in order to comply with the terms of this article. That however has limits. What is reasonable in one case may or may not be in another. Future cases must wait and be determined on their own facts.

Here the evidence as a whole showed that the employer did not make every reasonable effort to accommodate the grievant's restrictions. The question is now the appropriate remedy. The State argued that if back pay is awarded it should be mitigated by any wages, salary or other form of compensation for services, unemployment benefits or other government benefits program paid to the grievant during the pendency of the leave. This is appropriate and the grievant must provide appropriate documentation to the State to verify the amount of back pay awarded hereunder.

In addition, the grievant claimed out of pocket medical expenses as the result of the loss of his medical insurance during the period of leave. These are also appropriately awarded but the grievant must again provide appropriate documentation of the amounts of those payments as a condition of reimbursement. Accordingly, the grievant is to be made whole for all lost back pay and accrued contractual benefits as well as any out of pocket medical expenses paid as a direct and proximate result of the loss of his health insurance coverage during the period of his leave in this matter.

AWARD

The grievance is SUSTAINED. The State is ordered to make the grievant whole for all lost back pay, less any other compensation and/or wages or salary paid to the grievant during the period in question as set forth above. The grievant and Union shall provide any appropriate documentation of such wages or salary or any information or authorizations necessary to the State so that the correct payments can be made. The State shall also make the grievant whole for the out of pocket medical expenses as the result of the loss of health insurance in this matter. The grievant and Union shall provide all appropriate documentation of these payments so that the correct amount can be ascertained. The grievant's records shall be corrected to reflect the terms of this award and any reference to his termination shall be expunge from his employment record.

Dated: April 24, 2006

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Jeffrey W. Jacobs, arbitrator